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Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1992

$390,047 in U.S. CURRENCY and JESUS JOSE CASTRO VASQUEZ and LUZ MARLENE CASTRO,
Petitioners

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does Appellate jurisdiction exist over an in rem judgment in a civil forfeiture action involving currency in the absence of a stay of execution of the judgment? Do Appellate Courts have in personam jurisdiction?

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The Fifth, Seventh, Ninth and Eleventh Circuits follow the rule that where there has been no stay of a judgment in a civil forfeiture action, execution of the judgment removes the res from the control of court and jurisdiction in both the district and appellate courts is extinguished. The First, Second and Fourth Circuits have ruled that the courts have in personum jurisdiction of the parties and execution of the judgment does not extinguish appellate jurisdiction. The Third Circuit holds that courts never lose control of an incorporeal res. The disparity should be resolved by this court 4

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's appeal for lack of jurisdiction was made in October 17, 1991. The order denying Petitioner's request for rehearing was denied on January 30, 1992. Copies of the decision and order are attached as Appendices to this petition.

JURISDICTION OF THIS COURT

This court has jurisdiction pursuant to 28 U.S.C. 1254

STATEMENT OF THE CASE

On May 1, 1989, the United States government seized for forfeiture petitioners' money in the sum of $390,047.55 alleging a violation of 31 U.S.C. 5324(3) which prohibits the structuring of currency deposits in banks to avoid the reporting requirements of 31 U.S.C. 5313(a). This latter section requires a bank receiving a deposit in excess of $10,000.00 to file a report of the transaction. The district court held that probable cause existed to believe that petitioners had intentionally structured the deposits and on July 30, 1990 the ordered funds forfeited pursuant to 18 U.S.C. 981(a)(1)(A).

Petitioner filed a timely motion of appeal but did not request a stay of judgment in order to prevent execution of the order. The United States Marshall's Office executed on the order of forfeiture and it transferred the funds to the Department of Justice Assets Forfeiture Fund. Respondent then moved of the Court of Appeals to dismiss the appeal arguing that in an in rem action

removal of the res from the control of the court terminated the court's jurisdiction

The Ninth Circuit Court of Appeals in its Memorandum of Decision of October 17, 1991, agreed with Respondent holding that the "court's subject matter jurisdiction over an in rem action terminates once the property involved is removed from the court's control." The court went on to state that a stay of judgment was a prerequisite to preserve jurisdiction for appeal. The court further held that when traditional in rem principles apply to an appeal challenging an order of forfeiture that principles of in personam jurisdiction may not be asserted to confer jurisdiction over the appeal.

REASONS FOR ALLOWANCE OF THE WRIT

The Fifth, Seventh, Ninth and Eleventh Circuits follow the ancient admirality rule that in rem jurisdiction requires that the res remain within the jurisdiction of the courts until the end of the appellate process and that the removal of the res, from the courts control, destroys its jurisdiction. These same courts recognize exceptions to the rule when removal of the res is accidental, fraudulent or improper. They further hold that in civil forfeiture cases filed by the government, that execution of the judgment removes the res from the control of the courts and they can no longer exercise jurisdiction over the case because they have no in personam jurisdiction over the government. They state that the only manner of preserving the courts jurisdiction is for a party to obtain a stay of execution or to file a supersedeas bond. United States v. 29,959.99 United States Currency, 931 F. 2d 549 (9th Cir.) 1991); United States v. $84,740.00 United States Currency, 900 F.2d 1402 (9th Cir. 1990);

United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989); United States v. $79,000.00 United States Currency, 801 F.2d 738 (5th Cir. 1986); United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 881 (1988).

The First, Second and Fourth Circuits adopting the position of the dissenters in One Lear Jet, supra., have abandoned the above principle describing it as a principle of legal fiction whose legal construct is of dubious validity. The have further held that in rem jurisdiction was created to provide a convenient forum for admirality cases and that the principle should not be transformed into a weapon to defeat that very purpose. These courts have also ruled that by filing civil forfeiture suits the United States has submitted itself to the in personam jurisdiction of the court and should not be allowed to evade appellate review based on a defective legal fiction. U.S. v. One Lot of $25,721.00 in Currency, 938 F.2d 1417 (1st Cir. 1991);

U.S. v. Aiello, 912 F.2d 4 (2nd Cir. 1990), cert. denied, ___U.S.___, 111 S.Ct. 757, 112 L.Ed. 2d 777 (1991); U.S. v. $95,945.18, 913 F.2d 1106 (4th Cir. 1990).

The rationale used by these circuits for discarding the "no res, no jurisdiction" rule is as follows:

> "Unlike the typical case where the defendant ship stealthily absconds from the port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. Because the res is unlikely to disappear, we see no reason to require the claimant to file a stay of execution or supersedeas bond in a civil forfeiture action, because such bonds are typically filed to protect the interests of the party that prevailed in the district court. Having prevailed below, the government, if it wins the appeal, is assured of execution regardless of whether [the claimant] files a bond or stays execution of the judgment. United States v. $95,945.18, U.S. Currency, supra, 1109. (footnotes omitted).

The Third Circuit has approached the issue of jurisdiction in a totally different manner. This court holds that they do not lose jurisdiction of an appeal where the property involved is an incorporeal res such as money. They state that transferring seized money from one

government account to another government account does not remove the res from the district in which the forfeiture proceedings were filed because deeming the obligation to be located in any particular place would be a complete legal fiction. To the argument that the court lost jurisdiction because it lost control of the res upon execution, it holds that the transfer of the res from one government fund to another government fund, both accounts of the United States Treasury, did not deprive the federal courts of jurisdiction.

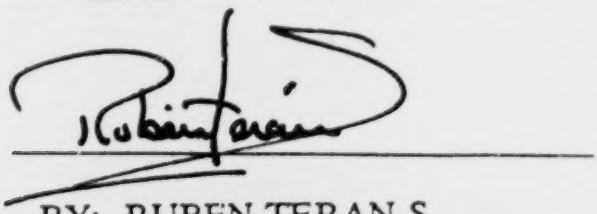
The decision of the eight circuit courts considering the issue of jurisdiction and whether in rem or in personam principles apply in civil forfeiture actions brought by the United States government are diametrically opposed to each other. Four circuits follow the traditional admirality rule of "no res, no jurisdiction." Three circuits describe the "no res, no jurisdiction" rule as an antiquated legal fiction whose principles are not appropriate in todays society. Another circuit, while not

abandoning traditional in rem principles, takes a middle ground holding that the court never loses jurisdiction when the property is an incorporated res such as money.

CONCLUSION

This honorable court should grant certiorari in order to resolve the conflict between the decisions of the various circuit courts. This court has not previously ruled on the issue presented.

Dated this 20th day of April, 1992.



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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	NO. 90-16194
Plaintiff-Appellee,	D.C. NO. CV-89-262-TUC-WDB
v.	MEMORANDUM*
$390,047.55 IN U.S. CURRENCY,	
Defendant,	
and	
JESUS JOSE CASTRO-VASQUEZ and LUZ MARLENE CASTRO,	
Claimants-Appellants.	

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge Presiding

Submitted October 8, 1991**
San Francisco, California

Before: GOODWIN, NORRIS and THOMPSON,
Circuit Judges

OVERVIEW

Claimants Jesus Jose Castro-Vasquez and Luz Marlene Castro appeal a district court order requiring the forfeiture of $390,047.55 deposited by them into three Arizona Bank accounts between 1987 and 1989. Many of these deposits were made on the same day, and each was for an amount less than $10,000.00. The district court held that probable cause existed to believe the claimants had intentionally structured the deposits in violation of 31 U.S.C. Sec. 5324(3).[1] As a result of claimants' actions, the court ordered the funds forfeited pursuant to 18 U.S.C. Sec. 981(a)(1)(A).

Following the judgment, claimants timely filed a notice of appeal with this court. No attempt was made, however, to seek a stay of judgment or to file a

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[1] 31 U.S.C. 5324(3) prohibits the structuring of deposits in an attempt to evade the reporting requirements of 31 U.S.C. 5313(a). This section requires any bank receiving a deposit in excess of $10,000 to file a report of the transaction.

supersedeas bond in order to prevent execution of the order. Subsequently, on October 5, 1990, the order of forfeiture was executed by the United States Marshal's office, which immediately transferred the funds to the Department of Justice Assets Forfeiture Fund.[2] Following execution of the order, appellee moved to dismiss the appeal as moot, arguing that this court's in rem jurisdiction over the property terminated once the funds were removed from the district court's control.

We agree with the appellee that in rem action terminates once the property involved is removed from the curt's control.

We agree with the appellee that in rem jurisdiction was lost when the funds were transferred to the Assets

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[2] The Department of Justice Assets Forfeiture Fund serves as the repository for "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice . . . ." 28 U.S.C. 524(c)(4). Proceeds from the Fund may be utilized at the discretion of the Attorney General. 28 U.S.C. 524(c)(1)

Forfeiture Fund. Accordingly, we dismiss this appeal.

DISCUSSION

The court's subject matter jurisdiction over an in rem action terminates once the property involved is removed from the court's control. Pennington v. Fourth National bank, 243 U.S. 269, 272 (1917); United States v. $57,480.05 United States Currency and Other Coins, 722 F.2d 1457, 1459 (9th Cir. 1984). We have consistently applied this rule to forfeiture proceedings, since by their very nature such actions are in rem. See, e.g., United States v. $2,490.00 in United States Currency, 825 F.2d 1419, 1420 (9th Cir. 1987) ("Because forfeiture proceedings are in rem, the court's subject matter jurisdiction is dependent on its continuing control over the property."). Consequently, unless control over the res is preserved following an order of forfeiture, an execution of that order will terminate our subject matter jurisdiction over the property. Id. at 1420. The filing of a notice of

appeal, without further action, is insufficient to protect the court's control over the res. Id.; American Bank of Wage Claims v. Registry of Dist. Ct., 431 F.2d 1215, 1218 (9th Cir. 1970).

Claimants in this case timely filed a notice of appeal of the district court's judgment. However, they failed to take any further action to preserve the court's control over the contested funds. At no time did they file, or attempt to file, a stay of the judgment in order to preserve jurisdiction for appeal. As a result, the court ceased to control the funds once appellee transferred them to the Assets Forfeiture Fund. Consequently, at the moment this transfer occurred, the court's subject matter jurisdiction over the property was destroyed. $57,480.05 United States Currency and Other Coins, 722 F.2d at 1459.

Claimants correctly assert that exceptions to this general rule have been recognized where the removal of the contested property from the court's control was

"accidental or fraudulent or improper." The Rio Grande, 90 U.S. (23 Wall.) 458, 465. However, these exceptions, while "frequently acknowledged in principle," are rarely, if ever, actually applied. United States v. Ten Thousand Dollars in United States Currency, 860 F.2d 1511, 1513 (9th Cir. 1988). No exception applies here.

The claimants are represented by competent counsel. They made no attempt to obtain a stay of the judgment in order to preserve the court's jurisdiction. Rather, the claimants mistakenly relied on their notice of appeal to protect against execution of the district court order. As we have repeatedly held, however, the filing of such a notice of appeal, without further action, is ineffective to prevent an otherwise valid execution of a forfeiture order. $2,490.00 in United States Currency, 825 F.2d at 1420. Consequently, while the execution of the district court's order may have taken claimants by surprise, it cannot be considered accidentl, fraudulent or improper.

Claimants further assert that, because the res was

transferred to the Assets Forfeiture Fund and not directly to the Treasury, the court still maintains control over the funds. In support of this contention claimants point to 18 U.S.C. Sec. 981(c), which states that "property taken or detained under this section . . . shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service . . . subject only to the orders and decrees of the court or the official having jurisdiction thereof."

Reliance on section 981(c) is misplaced. A careful reading of the section reveals that it only applied to the exertion of custodial authority over the res while a forfeiture action is pending. It does not allow a court to retain control over the property after the proper execution of a valid forfeiture order. Furthermore, the fact that the forfeited funds were released to an agency or account other than the Treasury is of little consequence, because, unless the recipient is itself under the control of the court, release of property to another government

agency or account extinguishes the court's control. See United States v.United States Currency in the Amount of $110,000.00, 735 F.2d 326, 327 (9th Cir. 1984 (court lacked jurisdiction over property released to the Drug Enforcement Administration); United States v. 66 Pieces of Jade, 760 F.2d 970, 972 (9th Cir. 1985) (court lacked jurisdiction where res was released to United States Customs Service).

Finally, the claimants argue that his court may assert in personam jurisdiction over their appeal. We disagree. When traditional in rem principles are applicable to an appeal challenging an order of forfeiture, we will not look to the jurisdictional standards established under International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny. $2,490.00 in United States Currency, 825 F.2d at 1420.

We dismiss this appeal for lack of subject matter jurisdiction over the res.

DISMISSED.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) NO. 90-16194
Plaintiff-Appellee,	) D.C. NO. CV-89-262-TUC-WDB
v.	) ORDER
$390,047.55 IN U.S. CURRENCY,	)
Defendant,	)
and	)
JESUS JOSE CASTRO VASQUEZ and LUZ MARLENE CASTRO,	)
Claimants-Appellants.	)

Before: GOODWIN, NORRIS and THOMPSON, Circuit Judges.

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. A majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.